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No. 06-87

Supreme Court, U.S.
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In the Supreme Court of the United States

GREG ALAN MORGAN, PETITIONER

v.

UNITED STATES OF AMERICA, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the court of appeals properly held that its prior ruling affirming the dismissal of all but one claim, and remanding only that claim for further development of the factual record, precludes petitioner's attempt to relitigate the dismissed claims or to raise new claims that could have been raised in the original complaint.

2. Whether petitioner, by driving into the guarded entry gate area of a closed military base, after having been warned by signs and by his superiors that he and his vehicle would be subject to search when on or entering the base, impliedly consented to the search of his vehicle.

Constitution, statutes and rules: Page

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Amend. V 6
Amend. VI 6
Amend. XIV 6
Federal Employee's Compensation Act, 5 U.S.C. 8116(c) 6, 8
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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-5) is not published in the Federal Reporter but is reprinted in 166 Fed. Appx. 292. The opinion of the district court (Pet. App. 24-30) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on February 7, 2006. A petition for rehearing was denied on April 19, 2006 (Pet. App. 61). The petition for a writ of certiorari was filed on July 18, 2006. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Petitioner was a civilian air traffic controller employed by the Federal Aviation Administration (FAA) on Edwards Air Force Base in California. According to peti-

tioner's complaint, on the morning of May 16, 1999, petitioner arrived at the base entry gate displaying his FAA identification badge. A base guard, Airman Eric Goodson, directed petitioner to stop his jeep on the side of the road, which petitioner did. Goodson asked if he could search petitioner's car, but petitioner declined, telling Goodson that he did not want to be late for work. After Goodson conferred with two other officers, Master Sergeant Kenneth Erichsen and Master Sergeant C. Eric Broughton, Broughton asked to see petitioner's vehicle registration, driver's license, and insurance papers. After the officers returned to the rear of petitioner's jeep, petitioner exited his car and walked toward the guard shack. Broughton ordered petitioner to get back into his vehicle. Petitioner responded by asking if he was under arrest. Broughton responded that he was not, but then, when plaintiff disputed the officer's direction instead of immediately returning to his car, Broughton handcuffed petitioner. Pet. App. 7-8, 86.

The officers then searched petitioner and his vehicle. During their search of the jeep, the guards discovered an unloaded nine-millimeter semi-automatic pistol in the car. The officers detained petitioner and turned him over to state authorities. Pet. App. 8-9. Petitioner alleges that, during his detention, Broughton tape-recorded petitioner's conversation with the officers. *Id.* at 19.

The State of California brought charges against petitioner under Sections 148(a), 12025(a), and 12031(a) of the California Penal Code (West 1999, 2000), for resisting, delaying or obstructing an officer, carrying a concealed firearm, and carrying a loaded firearm. Petitioner was also charged under Section 14601.1(a) of the California Vehicle Code (West 2000) for driving with a suspended or revoked license. The Penal Code charges were

dismissed by a state court on the ground that the guards lacked probable cause to search petitioner's vehicle and petitioner's expressed refusal to consent negated any implied consent from his presence at the base gate. The Vehicle Code charge was later dismissed as well. Pet. App. 9; *id.* at 59-60.

2. Petitioner filed this action in the United States District Court for the Central District of California alleging 25 causes of action against Broughton, Erichsen, Goodson, the United States, the Department of Defense, the Air Force, the Secretary of Defense, and three Base supervisory officials (Major General Richard Reynolds, Colonel Edward De Iulio, and Lieutenant Colonel Neil Rader). Pet. App. 9. The complaint alleged constitutional tort claims pursuant to *Bivens* v. *Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971), 42 U.S.C. 1983, 1985(1) and (3), and claims for unlawful recording of conversations under 18 U.S.C. 2511 and Section 632 of the California Penal Code (West 1999). Pet. App. 7, 17-19.

The district court dismissed all of petitioner's claims with prejudice. Pet. App. 55-57. The court dismissed the Section 1983 claims for failure to allege that the respondents acted in concert with state officials; dismissed the Section 1985(1) claims for failure to allege facts to support a claim that he was deprived of his constitutional rights on account of discharging his official duties; dismissed the Section 1985(3) claims for failure to allege racial or other invidious class-based discrimination; and dismissed the unlawful recording claims for failure to state a claim of eavesdropping. *Id.* at 56-57. The court also dismissed the *Bivens* claims, holding that "[a]s Edwards Air Force Base is a closed base, the [respondents] were not required to have probable cause to stop, inspect

and/or search [petitioner] and his vehicle, or to detain, and arrest [him]," and there was accordingly no Fourth Amendment violation. *Id.* at 57.[1]

The district court's order specified that dismissal was "with prejudice." Pet. App. 57. The court explained that "[i]t does not appear that plaintiff could state a claim upon which relief could be granted if allowed to amend." *Ibid.*

3. The court of appeals affirmed "in every respect, except with regard to the court's dismissal of the *Bivens* claim," Pet. App. 17, and remanded "that claim alone * * * to the district court for further proceedings," *id.* at 15. The court took the unusual step of issuing two opinions in connection with petitioner's appeal, an unpublished ruling disposing of all the non-*Bivens* claims, *id.* at 16-20, and a separate published ruling addressing and remanding the *Bivens* claim, *id.* at 6-15.

In its unpublished opinion, the court of appeals agreed that petitioner failed to allege that respondents acted under color of state law as required to state a claim under Section 1983, Pet. App. 17-18, noted that petitioner had failed to preserve his claims under Section 1985(1) and (3) on appeal, *id.* at 17 n.1; and held that because the officers could lawfully record their own conversation with petitioner, which took place in public, there was no violation of the federal or state statutes concerning unlawful recording, *id.* at 19. The court also rejected petitioner's attempt to assert for the first time on appeal a claim under the Federal Tort Claims Act (FTCA), 28 U.S.C. 1346(b)(1). Pet. App. 19. The court held that because the FTCA claim was not presented in the complaint and was

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[1] The court used the term "closed" to indicate that the base is not open to the public, rather than "nonoperational." See Pet. App. 7 n.1.

not raised in the district court, "[i]t is waived and we do not consider it." *Ibid.*

The court of appeals addressed in a separate opinion (Pet. App. 6-15) petitioner's *Bivens* claims, "[a]ll of [which] * * * depend[ed] upon the search's failure to comply with the Fourth Amendment," *id.* at 11. The court held that the district court had erred in dismissing the Fourth Amendment claims under Federal Rule of Civil Procedure 12(b)(6) on account of "the closed nature of the active military Base" because petitioner's "Complaint contains no allegations as to the status of the installation." Pet. App. 7. The court rejected any suggestion by the district court that there is "a categorical exception to the probable cause rule for all searches on closed military bases," and held, instead, that the relevant question is whether an individual has "impliedly consented to the search" in light of circumstances at the base. *Id.* at 15. The court of appeals therefore reversed the district court's Rule 12(b)(6) dismissal of petitioner's *Bivens* claim, and remanded *"that claim alone* * * * to the district court for further proceedings on a more complete factual record." *Ibid.* (emphasis added).

4. On May 2, 2003, petitioner sought to file an amended complaint in the district court, which the district court rejected on the ground that the court of appeals' mandate had not issued nor had the district court reopened the case at the time of the attempted filing. See Pet. App. 47-48, 49-50; Docket Entry Nos. 44, 55, No. CV 00-5221 (C.D. Cal.). Petitioner's next attempt to file an amended complaint was also rejected because petitioner did not have leave of court. See Pet. App. 42-43; Docket Entry Nos. 47, 53, No. CV 00-5221 (C.D. Cal.).

Petitioner later moved for leave to file a First Amended Complaint, which the district court granted on

October 3, 2003. See Pet. App. 40-41. The amended complaint alleged essentially the same Fourth Amendment claims under *Bivens* as had petitioner's prior complaint. In addition, petitioner reasserted his claim under 42 U.S.C. 1983 and added new claims under the Fourth, Fifth, Sixth, and Fourteenth Amendments for excessive force and illegal custodial interrogation (Counts 8-11).[2]

After the close of discovery, the district court granted summary judgment in favor of respondents on petitioner's *Bivens* and other constitutional tort claims. Pet. App. 24-30.[3] The court held that "all claims in the first amended complaint, except the *Bivens* claim the Ninth Circuit remanded, are barred by the doctrines of res judicata and the law of mandate." *Id.* at 29. Moreover, with regard to the supervisor respondents, the court concluded that petitioner "failed to establish a causal connection between any supervisory act and the alleged constitutional violations," and those defendants could not be held liable under a "respondeat superior" theory. *Ibid.*[4]

The court held that the three officers involved in the incident were entitled to qualified immunity because

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[2] Petitioner also filed a second action seeking damages against the United States under the FTCA based upon the same incident, which was assigned to the same district court judge who presided over the earlier suit. No. CV 03-2372 (C.D. Cal.).

[3] The district court, having already extended the discovery cutoff once, denied petitioner's motion for a further extension, Docket Entry No. 135, No. CV 00-5221 (C.D. Cal.), and similarly denied petitioner's request pursuant to Federal Rule of Civil Procedure 56(f) to delay ruling on respondents' summary judgment motion. Pet. App. 32.

[4] The court also held that petitioner's claims against the United States, the Department of Defense, the Air Force, and the individual defendants sued in their official capacities were precluded by the exclusive remedy available under the Federal Employees' Compensation Act, 5 U.S.C. 8116(c). Pet. App. 28-29.

their actions "did not violate any clearly established statutory or constitutional rights." Pet. App. 29. The court further held, based on the undisputed facts, that petitioner's Fourth Amendment *Bivens* claims failed because "[t]he totality of the circumstances puncture any reasonable expectation of privacy that [he] might have had" and that therefore petitioner had "impliedly consented to the search." *Id.* at 30.

The court noted that, along petitioner's regular commuting route, the base was prominently marked as a restricted military installation by fences with steel posts and barbed wire, as well as signs on the fences and along the road. Pet. App. 26-27. Just before the gate where the incident occurred, which was located "well inside the perimeter" of the base, a larger sign announced the same warning as the warning on the fences: "It is unlawful to enter this area without permission of the Installation Commander," and "[w]hile on this installation all personnel and the property under their control are subject to search." *Id.* at 27. All guard gates at the base were staffed at all times with uniformed and armed Air Force security personnel, and "[t]he configuration of the guard gate clearly would have suggested to any reasonable individual that it was a secured entrance." *Ibid.* Moreover, FAA employees, such as petitioner, had been informed at their orientation that they and their vehicles were subject to search at any time while on, entering, or leaving the base. *Id.* at 27-28. Finally, the court concluded that respondents would not be liable for damages in any event, because there was no genuine issue of fact as to

whether petitioner sustained any damages as a result of the alleged actions; "[h]e did not." *Id.* at 30.[5]

5. The court of appeals affirmed. Pet. App. 1-5. The court held that all of petitioner's claims (apart from the original *Bivens* claims) were barred because they "were either already litigated, or should have been raised in [petitioner's] original Complaint." *Id.* at 3.[6] With respect to petitioner's Fourth Amendment *Bivens* claims, the court held that, based on the uncontroverted facts, the district court "did not err in concluding that [petitioner] impliedly consented to the search" in light of the many warnings he had received via posted signs and the notice given to FAA employees that personnel and vehicles entering the base were subject to search. *Id.* at 4-5.[7]

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[5] The district court also granted judgment in favor of the United States in the FTCA case. The court first held that petitioner's FTCA claim was barred by the exclusivity provision of the Federal Employees' Compensation Act, 5 U.S.C. 8116(c). See Amended Order of Feb. 27, 2004, at 1-2 (Docket Entry No. 53), No. CV 03-2372 (C.D. Cal.). The court also held that the FTCA claim would be barred in any event by "the law of mandate and res judicata." *Id.* at 2.

[6] The court of appeals affirmed the judgment in the United States' favor in the FTCA action for similar reasons. The court of appeals noted that petitioner had attempted to assert that claim in the prior appeal of the constitutional tort case and that, at that time, the court of appeals had "ruled that [petitioner] had waived that claim because [he] failed to properly present it before the district court." Pet. App. 3. Petitioner does not seek this Court's review with respect to the FTCA action.

[7] The court of appeals also held that the district court did not abuse its discretion in denying further extensions of discovery, "given that the *Bivens* action was filed in May 2000, and [petitioner] had more than sufficient time to conduct discovery," Pet. App. 2, and because he "provided only conclusory and speculative statements" in support of his Rule 56(f) motion, *id.* at 4 n.1.

ARGUMENT

The court of appeals' decision is correct and does not conflict with any decision of this Court or another court of appeals. Further review by this Court is therefore unwarranted.

1. a. Petitioner's first question presented, regarding a party's right to amend his complaint once as of right prior to the filing of an answer (Pet. 12-23), asks the Court to resolve a question that was rendered moot by the district court's order granting petitioner leave to file the very complaint that he maintains he should have been allowed to file as of right. As petitioner notes (Pet. 6-7), his first attempt to file an amended complaint was rejected because the court of appeals' mandate had not yet issued, and his second attempt was rejected because the court had not granted leave to amend. See Pet. App. 42-43, 47-48, 49-50; Docket Entry Nos. 44, 47, 53, 55, No. CV 00-5221 (C.D. Cal.). Subsequently, however, the district court did grant petitioner leave to file his amended complaint. See Pet. App. 40-41. The court found that "justice requires granting the motion." *Id.* at 41. Because petitioner was ultimately permitted to amend his complaint, the question upon which he seeks this Court's review—whether the amendment should have been permitted as of right, rather than by motion and leave of court—is moot.

Notably, the court of appeals's decision does not address Rule 15(a) of the Federal Rules of Civil Procedure. Indeed, Rule 15 is not even mentioned in the court of appeals' opinion.[8] Petitioner instead asks the Court to re-

[8] Rule 15(a) provides that "[a] party may amend the party's pleading once as a matter of course at any time before a responsive pleading is served" or "by leave of the court." Fed. R. Civ. P. 15(a).

view the court of appeals' construction of Rule 15(a) as reflected in *other* decisions by the Ninth Circuit. See Pet. 13-14.[9] Review on the first question presented is therefore unwarranted.

b. Petitioner contends (Pet. 17-21) that there is a conflict among the circuits concerning whether dismissal of a complaint that does not terminate the action cuts off a party's right to amend a pleading. Even if this case concerned Rule 15(a), which it does not, it would still not be a proper vehicle for resolving the purported circuit conflict identified by petitioner. Petitioner maintains that the Ninth Circuit "*does not* cutoff the right [to amend] after dismissal for failure to state a claim, * * * after summary judgment, * * * [or] after losing an appeal." Pet. 13 (emphasis added; citations omitted). Petitioner contends that, in contrast, "the First, Second, Eight[h] and Tenth Circuits hold that, unless the court expressly grants leave to amend, an order dismissing the complaint is final, terminating plaintiff's right to amend once as a matter of course," Pet. 17, and that the Fifth and Eleventh Circuits hold that "[a]n order dismissing the complaint is not a dismissal of the action unless it also states the right is denied or otherwise indicates no amendment is possible," Pet. 18. If anything, the Ninth Circuit's rule, as interpreted by petitioner, is *more favorable* to petitioner than the rules of the other courts with which the court below is in alleged conflict. Moreover,

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[9] Contrary to petitioner's repeated representations (Pet. 9, 13, 14, 16), the decision below does not mention *Foman* v. *Davis*, 371 U.S. 178, 182 (1962), much less "interpret" it; nor does it cite any other case interpreting Rule 15. And, again contrary to petitioner's contention (Pet. 20), the court's only reference to "discretion" was its holding that the district court did not abuse its discretion in refusing petitioner's second and third requests to extend *discovery*. See Pet. App. 2, 4 n.1.

the district court order in this case specifically stated that its dismissal was "with prejudice," Pet. App. 57, because "[i]t does not appear that plaintiff could state a claim upon which relief could be granted if allowed to amend," *ibid.* Thus, petitioner would not benefit from adoption of one of the rules applied in the other circuits he discusses, because even under those rules it appears that petitioner's right to amend his complaint as of right was terminated by the district court's entry of a dismissal with prejudice, which the court of appeals affirmed "in every respect, except with regard to the court's dismissal of the *Bivens* claim." *Id.* at 17.

c. Although petitioner criticizes (Pet. 15-16) the court of appeals' holding that petitioner's newly asserted claims were barred by the doctrine of res judicata, he does not present any such issue as a question presented for review. See Pet. i. The court of appeals was, in any event, correct to affirm the dismissal of all claims in the amended complaint (except for the *Bivens* unreasonable search claim) as precluded by the district court's earlier judgment of dismissal and the court of appeals' own affirmance (with a narrow exception) of that dismissal.

The court of appeals held that the new claims "were all barred by res judicata." Pet. App. 3. The doctrine of "res judicata" prescribes the "preclusive effects of former adjudication" on issues or claims raised in a subsequent suit. *Migra* v. *Warren City Sch. Dist. Bd. of Educ.*, 465 U.S. 75, 77 & n.1 (1984). Although the phrase "res judicata" is generally used with respect to the preclusive effect of a final judgment on a subsequent action, see, *e.g.*, *Parklane Hosiery Co.* v. *Shore*, 439 U.S. 322, 326 n.5 (1979), similar preclusion principles govern subsequent stages of the *same* litigation, pursuant to the doctrine of law of the case and its corollary, the mandate

rule. See *Arizona* v. *California*, 460 U.S. 605, 618 (1983) ("As most commonly defined, the doctrine [of law of the case] posits that when a court decides upon a rule of law, that decision should continue to govern the same issues in subsequent stages in the same litigation."); *Fuhrman* v. *Dretke*, 442 F.3d 893, 896-897 (5th Cir. 2006) ("The mandate rule is a corollary of the law of the case doctrine providing 'that a lower court on remand must implement both the letter and the spirit of the [appellate court's] mandate, and may not disregard the explicit directives of that court.") (quoting *United States* v. *Becerra*, 155 F.3d 740, 753 (5th Cir. 1998)) (internal quotation marks omitted).

The district court properly concluded that those principles of finality barred it from considering "all claims in the first amended complaint, except the *Bivens* claim the Ninth Circuit remanded," Pet. App. 29, and the court of appeals properly affirmed on that basis, *id.* at 3. See *Henderson* v. *Stalder*, 407 F.3d 351, 354 (5th Cir. 2005) (court of appeals' "narrow" remand order permitting plaintiff to amend her complaint to add a facial challenge to a government program "was not an invitation for [plaintiff] to add new claims or rationales for [another party's] standing"), cert. denied, 126 S. Ct. 2967 (2006).[10] Accordingly, the dismissal of petitioner's non-*Bivens* claims on grounds of preclusion presents no issue warranting this Court's review.

2. Petitioner's second question presented (Pet. i), like his first, is not genuinely presented by the decision of the court of appeals. Whereas petitioner asks this

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[10] Petitioner does not contend that the court of appeals' use of the terminology of "res judicata" rather than the arguably more precise language of "law of mandate" and "law of the case" that the district court used, Pet. App. 29, warrants this Court's review.

Court to review the question whether "'military bases' are exempt from the probable cause requirement of the Fourth Amendment," *ibid.*, see also Pet. 12, 24, the court of appeals, in fact, expressly rejected such a rule, Pet. App. 15. On the prior appeal, the court of appeals held that the district court had gone "too far in allowing a categorical exception to the probable cause rule for all searches on closed military bases." *Ibid.* Rather, the court held, "the probable cause requirement is only obviated if the [petitioner] impliedly consented to the search." *Ibid.*[11]

Consistent with the decisions of two other circuits, the court of appeals directed the district court to consider the totality of the circumstances under which the search occurred to determine whether consent was implied by the nature of the facility and the location of the search. Pet. App. 12-14; see *United States* v. *Ellis*, 547 F.2d 863, 866-867 (5th Cir. 1977) (entry on Naval Air Station using vehicle pass that notified user that his person and vehicle were subject to search on station premises constituted implied consent to search); *United States* v. *Jenkins*, 986 F.2d 76, 79 (4th Cir. 1993) ("Consent is implied by the 'totality of all the circumstances,'" such as "[t]he barbed-wire fence, the security guards at the gate, the sign warning of the possibility of search, and a civilian's common-sense awareness of the nature of a military base.").

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[11] The language petitioner relies upon for his characterization of the court of appeals' holding (Pet. 24) is a passage in the court's decision in which it describes, and quotes from, the Fourth Circuit's opinion in *United States* v. *Jenkins*, 986 F.2d 76, 78 (1993). See Pet. App. 13. Although the opinion below later states that the court "join[s] the Fourth Circuit," it specifies that it does so only to the extent that the Fourth Circuit "hold[s] that a person may impliedly consent to a search on a military base." *Id.* at 14.

On appeal after remand, the court of appeals did, in fact, apply a totality of the circumstances approach. The court emphasized that petitioner had been transferred to the base the year before the incident and that his commute took him past the property line marked with steel posts, barbed wire, and signs warning that persons and property on the installation were subject to search, that a similar sign was posted at the gate where petitioner entered, and that FAA employees such as petitioner were advised of the fact that he and his vehicle were subject to search when on, entering, or leaving the base. Pet. App. 4-5.

Petitioner contends (Pet. 25-26) that the court of appeals' finding of implied consent was erroneous on the facts of this case because, he maintains, the search took place "outside of the 'Installation'" (Pet. 10), on a highway that is "open to the public" (Pet. 26). However, petitioner cites no evidence in the summary judgment record to contradict the district court's conclusions that "the guard gate where the incident occurred" was located "well inside the perimeter of Edwards AFB in a desolate area," and that "[t]he configuration of the guard gate clearly would have suggested to any reasonable individual that it was a secured entrance." Pet. App. 27 ¶¶ 15, 16.

Petitioner (Pet. 25) also argues that any implied consent was vitiated by his express refusal to consent to the search when asked at the gate by the guard. But petitioner's expressed reason for not consenting to a search was that he would be late for work (Pet. App. 8), indicating that he did not immediately intend to leave the base premises. Moreover, petitioner thereafter voluntarily exited his vehicle and approached the guard shack, leaving his vehicle at the entrance. The court of appeals'

finding that the totality of the circumstances demonstrated implied consent to the search is therefore correct. Even if it were not, that fact-bound determination would not warrant this Court's review.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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